DOCUMENT RESUME

ED 078 523 EA 005 114

AUTHOR	Phay, Robert E.
TITLE	Teacher Dismissal and Nonrenewal of Teacher Contracts. Proposed School Board Regulations.
INSTITUTION	North Carolina Univ., Chapel Hill. Institute of Government.
PUB DATE	72
NOTE	51p.
AVAILABLE FROM	Institute of Government, Box 990, Chapel Hill, North Carolina 27514. ($3.00, Quantity Discounts)
EDRS PRICE	MF-$0.65 HC-$3.29
DESCRIPTORS	Board of Education Policy; *Contracts; *Due Process; Guidelines; Principals; *State Legislation; Superintendents; Teacher Discipline; *Teacher Dismissal; *Tenure
IDENTIFIERS	*Nonrenewal; North Carolina

ABSTRACT

In 1971 the North Carolina General Assembly enacted a tenure law for the State's public school teachers and principals. Codified as G.S. 115-142, the Act became effective July 1, 1972. It requires local boards of education to adopt "reasonable rules and regulations" for the conduct of hearings on dismissing or demoting teachers and principals. This booklet contains five procedural codes to be usedas guides for boards of education as they develop their own hearing regulations. These codes concern teacher dismissal, demotion, or the nonrenewal of a teacher's contract. They also describe procedures to be followed in dismissing assistant superintendents and superintendents during the contract period, and provide forms to be used with these procedures by the superintendent or the school board. The appendix contains the State Board of Education hearing regulations to be followed in the event the local school board does not adopt its own regulations and a chart showing the time requirements of the tenure act when a recommendation to dismiss or demote a teacher has been made. (Author)

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TEACHER DISMISSAL AND NONRENEWAL OF TEACHER CONTRACTS

Proposed School Board Regulations

Robert E. Phay

EA 005 111

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Foreword

In 1971 the North Carolina General Assembly enacted a tenure law for the state's public school teachers and principals. Codified as G.S. 115–142, the act becomes effective July 1, 1972. It requires local boards of education to adopt "reasonable rules and regulations" for the conduct of hearings on dismissing or demoting teachers and principals. This booklet contains five procedural codes concerning teacher dismissal or demotion or the nonrenewal of a teacher's contract. These codes include procedures for dismissing teachers and principals, dismissing assistant superintendents and and superintendents during the contract period, and not renewing a nontenured teacher's contract, plus forms for the superintendent and school board to use with these procedures. All of these procedural codes are to be used as guides for the board as it develops its own hearing regulations.

Several people helped in developing these codes—particularly William Adams, third-year law student at Duke University, and Charlotte Shuford, third-year law student at The University of North Carolina at Chapel Hill, whose research and aid in drafting the codes I greatly appreciate. Thanks also to the following people for reading the manuscript and suggesting additions and modifications: Raleigh E. Dingman, Executive Secretary of the North Carolina School Boards Association; Donald H. Morrow of the North Carolina Association of Educators; John E. Phay, Director of Institutional Research at The University of Mississippi; Mary A. Scroggs, Chairman of the Chapel Hill-Carrboro Board of Education; Margaret Taylor and C. E. Hinsdale of the Institute of Government; and Neal F. Tracy, Associate Dean of the UNC School of Education.

Experience with these codes will inevitably demonstrate need for modification. I welcome any suggestions for change and would appreciate receiving a copy of any adopted code.

Robert E. Phay
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Law and Government

Chapel Hill
May 1972

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Introduction

Written regulations for the dismissal or demotion of teachers and administrators and for the nonrenewal of a teacher's contract have long been needed. Today, however, they are necessary in order to satisfy the requirements of the North Carolina Tenure Act and to insure compliance with the more stringent constitutional requirements of due process. To help school boards develop such policies, five procedural codes and several forms to be used with them have been written. They are contained in this booklet. Also included in the appendix are the hearing regulations of the State Board of Education, which are to be followed if the local school board does not adopt its own regulations, and a chart showing the time requirements of the tenure act when a recommendation to dismiss or demote a teacher has been made.

Each code contains rules or sections that are followed by comments explaining or clarifying their intent. In many cases the comments are essential to the meaning of the section and should be adopted with it if the section is adopted. At times, however, the comments only explain the sequence or purpose of the state statutory section and should be omitted if the section is adopted.

Optional sections are provided when a reasonably attractive alternative or addition exists. When options are listed, the first is preferred. **Bracketed material is an option to that part of the section or sentence.**

To help relate the proposed board regulations to existing state statutes, citations to applicable North Carolina statutes have been added in the comments.

What School Boards Should Do

To develop procedures for dismissing or demoting the school's professional employees, I recommend that the school board establish a committee with representation from the teachers, the administrators, and perhaps the school board. These codes should be

used as a guide, but the committee should decide for itself the policies that are best for its school system. The regulations must, of course, comply with statutory and constitutional requirements, and the school board attorney should be available to advise the committee in its work. The committee's final draft should go to the school board for the board's consideration, amendment, and final adoption as official school board policy. Once the procedural codes are adopted, the school board should provide a copy to each professional school employee and should publicize the codes widely.

When these things have been done, local boards of education should have clear procedures for dismissing and demoting the school's professional employees. These procedures, when followed, not only will satisfy the statutory requirements of the tenure act and the constitutional requirements of due process, but also will go far in assuring that school employees are treated fairly.

CODE I

Basis for Dismissal or Demotion of Teachers

RULE 1. STATUTORY BASIS FOR DISMISSAL OR DEMOTION

A tenured teacher or a probationary or other nontenured teacher during the school year [contract period] may, in accordance with G.S. 115–142(e)(1), be dismissed, demoted, or reduced to a part-time basis for one of the following reasons:

a. Inadequate performance;
b. Immorality;
c. Insubordination;
d. Neglect of duty;
e. Physical or mental incapacity;
f. Habitual and excessive use of alcoholic beverages or narcotic drugs;
g. Conviction of a felony or a crime involving moral turpitude;
h. Advocating the overthrow of the Government of the United States or of the State of North Carolina by force, violence, or other unlawful means;
i. Failure to fulfill the duties and responsibilities imposed upon teachers by the North Carolina General Statutes;
j. Any cause that constitutes grounds for revoking a career teacher's teaching certificate; or
k. A justifiable decrease in the number of positions due to district reorganization or decreased enrollment.

Comment: G.S. 115–142(e)(1) sets out the grounds for dismissing, demoting, or reducing to a part-time basis a tenured

teacher at any time or a probationary teacher during the school year. Rule 1 restates the statutory grounds for dismissal and demotion.

Interpreted literally, the statutory basis for dismissal or demotion applies only to teachers who hold "at least a 'Class A certificate' as provided by G.S. 115–153 or any other regular vocational or rehabilitation teaching certificate." This section adds "or other nontenured teacher" to the rule in order to make the rule apply to all teachers in the employ of the school board.

The statute uses the term "school year" when describing the probationary teacher's procedural rights and thus this term has been used here. The term "contract period" is more precise and can be used instead of "school year."

RULE 2. ADDITIONAL LOCAL SCHOOL BOARD GROUNDS FOR DISMISSAL OR DEMOTION

As authorized by G.S. 115–142(e)(1)(j), a tenured teacher or a probationary teacher during the school year may be dismissed, demoted, or reduced to a part-time basis for one of the following reasons:

(1) _____

(2) _____

Comment: The use of Rule 2 is optional. G.S. 115–142(e)(1)(j) permits the school board to dismiss or demote teachers who fail to comply with reasonable requirements prescribed by the board—for example, by assaulting school personnel. Although such a regulation might be covered by one of the reasons set out in G.S. 115–142(e)(1) [Rule 1], the school board may want to be more specific than the statute. It also may want to define such vague statutory terms as inadequate performance and immorality. If the board chooses to adopt such requirements, it should do so in this code so that the requirements are widely publicized and clearly understood.

CODE II

Procedure for Dismissal or Demotion of Teachers

SECTION 1. COVERAGE

This procedure shall be used in

a. Dismissing,[1] demoting, or reducing to a part-time basis the employment of a tenured teacher without the teacher's consent;
b. Discharging a probationary [or other nontenured] teacher during the school year [period for which he has been employed] without his consent.

Comment: This code sets out a procedure consistent with the new tenure act (G.S. 115–142) for dismissing or demoting a tenured teacher and discharging a probationary teacher during the contract period of employment.

The board of education is required to follow the procedure of G.S. 115–142 only for teachers who hold "at least a 'Class A Certificate' as provided by G.S. 115–153 or any other regular vocational or rehabilitation teaching certificate." If the board wants to make this procedure available for less than class A-certificated teachers, it can do so by adding the words "or other nontenured" as set out in brackets in Subsection b above.

SECTION 2. LOCAL SUPERINTENDENT'S INVESTIGATION

The [name of local school unit] superintendent has the initial responsibility in the dismissal procedure. When allegations con-

[1]For simplicity, the word dismissing shall hereafter include dismissal, demotion, or reduction to a part-time basis.

stituting a basis for dismissing a teacher are made by a principal or other person, the superintendent shall investigate them and review all available information before deciding to recommend dismissal. If he thinks it justified, he shall interview the teacher and permit him to raise any defense that he thinks relevant. Before beginning the interview, the superintendent shall advise the teacher of the purpose of the interview and the charges against him. If the teacher requests that other witnesses be questioned, the superintendent shall interview them if possible.

Comment: The superintendent's investigation is intended to be informal and provide a basis for him to reach a preliminary determination as to the validity of the charges and whether dismissal or demotion is the appropriate action. It is not provided for by the statute.

SECTION 3. SUSPENSION WITHOUT PAY

If the local superintendent determines that there is cause for dismissing a teacher on any ground specified in paragraphs (b) through (h)[2] of Rule 1 and that the immediate suspension of the teacher is in the best interest of the school system, he may ask the board to suspend the teacher immediately. The board, on the superintendent's recommendation or on its own motion, may suspend the teacher without pay if it believes cause exists for dismissal on any ground specified in Rule 1(b) through (h) and that the suspension is in the best interest of the school system. The suspension must be by board resolution, and the teacher need not be given notice or a hearing before being suspended.

When a teacher is to be suspended, the superintendent need not conduct the investigation described in Section 2. However, within five days after the suspension, he must either initiate dismissal or demotion procedures in accordance with this code or reinstate the teacher. If it is ultimately determined that grounds do not exist for dismissing or demoting the teacher, the teacher shall, in accordance with G.S. 115–142(f), be immediately reinstated to his position and paid for the period of suspension.

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[2]The statute reads "b to h." It is my opinion that the legislature intended to permit suspension for the grounds specified in paragraphs b through h, inclusive, of G.S. 115–143(e).

Comment: Immediate suspension is intended to cover those rare situations in which the continued presence of the teacher will very probably cause substantial damage to the educational processes, such as when a teacher has committed a homicide or criminal assault on a student. The immediate need to remove the teacher to protect the school provides a reasonable basis for immediate suspension.

The suspension authorized by this section is based on G.S. 115–142(f). It contemplates the docking of pay, and only the board of education may impose it. There will be times, however, when a teacher must be removed immediately by a principal, such as when a teacher has lost emotional control. In such a situation, the principal can act unilaterally and need not await the approval of the superintendent or the board. This type of suspension would not involve loss of pay. It also should be noted that some courts have required proof of substantial damage to the educational process when the teacher is suspended for what might have been the exercise of a First Amendment right, such as statements made in the classroom. [*See, e.g., Parducci v. Rutland,* 316 F. Supp. 352 (M.D. Ala. 1970), and *Mailloux v. Kiley*, 448 F.2d 1242 (1st Cir. 1971).]

SECTION 4. SUPERINTENDENT'S NOTICE TO TEACHER OF RECOMMENDATION TO DISMISS

If the superintendent, after his investigation, decides that dismissal is justified, he shall notify the teacher by certified mail that he intends to recommend dismissal. This notice shall include:

a. A list of the charges upon which dismissal is to be recommended to the school board.

b. A summary of the evidence and the names and positions of the accusers.

c. An explanation of the teacher's alternatives, which are:

(1) The teacher may, within 15 days after receiving the notice, request that the superintendent's recommendation be reviewed by a five-member panel of the Professional Review Committee before the local school system takes any further action. In the request for a panel review, the teacher shall

have the right to reject up to 40 of the Professional Review Committee as unacceptable for his panel. The teacher also has the right to require that at least two of the five panel members "be members of his professional peer group."

(2) The teacher may waive the panel review and request an immediate hearing before the school board. The waiver of panel review must be in writing. If the teacher requests an immediate hearing before the school board, it shall be scheduled at the earliest time pursuant to Section 5(b) of this code.

(3) The teacher may do nothing. If the teacher does not request a panel review or school board hearing within 15 days after receiving the superintendent's recommendation, the superintendent may file his recommendation with the school board, which may act on the recommendation without a hearing.

d. A copy of the tenure act (G.S. 115–142).

e. A copy of this code.

f. A current list of members of the Professional Review Committee.

Comment: G.S. 115–142(h)(2) requires the superintendent to give the teacher written notice by certified mail of his intention to recommend dismissal or demotion and the grounds and evidence upon which he makes the recommendation. This notice serves the functions of allowing the teacher to make an informed decision on whether to request a review and to prepare a defense. Constitutional due process standards of adequate notice entitle the teacher to full knowledge of the offense charged, the basis of the charge, the nature of the hearing, and the opportunities for defense. [*See, e.g., Lucas v. Chapman,* 430 F.2d 945 (5th Cir. 1970).]

The State Superintendent of Public Instruction, with the consent of the State Board of Education, has the responsibility for appointing the members of the Professional Review Committee. This committee consists of 121 members, eleven from each congressional district. Five of the eleven shall be lay persons, and six shall have taught or supervised in the public schools for the past five years. [G.S. 115–142(g).] The State Superintendent will furnish local superintendents with the committee list that is to be included in the notice.

The teacher's right to reject up to 40 members of the Professional Review Committee from consideration for mem-

bership on his review panel and to have at least two panel members from his professional peer group are provided for by G.S. 115–142(i)(1) and G.S. 115–142(h)(4), respectively.

Form 1 in Appendix A is a suggested notice form.

SECTION 5. PANEL REVIEW WAIVED

(a) If the teacher does not respond within 15 days after receiving the notice provided in Section 4, it shall be presumed that he has waived his right to a panel review, and the superintendent may forward his recommendation, together with the evidence upon which such recommendation was made, to the board—but not until 20 days after notice was given to the teacher. After receiving the superintendent's notice, the board may by resolution dismiss or reinstate the teacher.

(b) The teacher may waive the panel review and request an immediate hearing before the board of education. This waiver and request must be made within 15 days after the superintendent's notice and must be in writing. If an immediate hearing is requested, the school board shall schedule it at the earliest possible date, but not before 10 days after the teacher receives notice of the date.

Comment: G.S. 115–142(h)(3) requires the teacher to request a panel review within 15 days after he receives notice if he wants to preserve his right to a later hearing before the school board. If no request is made for the panel, the superintendent may file his recommendation with the board, which can then act on the recommendation without a hearing. The teacher, as a result, is in the position of having to request a panel review in order to have a hearing before the school board. This section of the code adds an option not provided by the statute by permitting the teacher to waive the panel review and request an immediate hearing before the board of education.

The requirement that the superintendent wait 20 days after giving notice to the teacher before submitting his recommendation to the board is in accordance with G.S. 115–142(h)(2). This time requirement and the others required by the statute are set out in Appendix C.

SECTION 6. PANEL REVIEW REQUESTED

If the teacher requests a panel review, the local superintendent, within five days after he receives the request, shall ask the

Superintendent of Public Instruction to designate a review panel. If the teacher has designated members of the Professional Review Committee (up to 40) as unacceptable for his panel or has demanded that at least two panel members be from his professional peer group, the local superintendent shall include this information in his request. The request also may include a list of up to 40 members of the Professional Review Committee whom the local superintendent deems to be unacceptable for the review panel.

Comment: If the panel review is requested, the local superintendent within five days must ask the Superintendent of Public Instruction to appoint the panel. [G.S. 115–142(h)(4).] Until the panel review is completed, the local board of education can neither receive the superintendent's recommendation nor take any action except suspension as set out in Section 3 of this code.

The local superintendent and the teacher may each designate up to 40 members of the Professional Review Panel who may *not* serve on the review panel. [G.S. 115–142(i)(1).] The teacher also has the right to require that two of the panel members be from his professional peer group. [G.S. 115–142(h)(4).]

The Superintendent of Public Instruction has the responsibility for designating the hearing panel within *ten* days after receiving the local superintendent's request. Two of the members must be lay persons, and none of the members may be employed in or be residents of the county in which the request is made. [G.S. 115–142(h)(4).] (See comment to Section 4 of this code for the composition and appointment of the Professional Review Board.)

SECTION 7. HEARING BEFORE REVIEW PANEL

[The procedures for the hearing before the review panel are set out in the tenure statute.]

Comment: G.S. 115–142(i) permits the review panel to conduct such investigation as it considers necessary to determine the validity of the superintendent's recommendation. The panel's procedures are also set out in the statute. They give the superintendent and the teacher the right to appear with counsel, present any pertinent evidence, and cross-examine witnesses.

SECTION 8. PANEL REPORT

[The requirement for a panel report is provided in the tenure statute.]

Comment: G.S. 115–142(4) requires the panel to complete its investigation and submit a written report to the superintendent within 30 days after its appointment. (An extension of 60 days is authorized if necessary.) The panel's report will contain an outline of the scope of its investigation and its findings as to whether the grounds for the superintendent's recommendation are true and substantiated. No provision is made for giving the teacher a copy at this time.

SECTION 9. SUPERINTENDENT'S RECOMMENDATION

After receiving the panel report, the superintendent may either recommend dismissal to the board or drop the charges. If he does not recommend dismissal within 30 days after receiving the panel report, the charges are automatically dropped. If the superintendent recommends dismissal, he shall state the grounds for his recommendation and include a copy in the panel's report.

Comment: The panel report does not bind the superintendent. He may recommend dismissal even though the panel found the charges unsubstantiated. The 30-day time requirement is set by G.S. 115–142(i)(5).

SECTION 10. BOARD OF EDUCATION'S NOTICE TO TEACHER OF RECOMMENDATION TO DISMISS

Within 10 days after the board receives the superintendent's recommendation, and before it takes any formal action, the chairman of the board shall notify the teacher by certified mail of the superintendent's recommendation. This notice shall contain:

a. A copy of the superintendent's recommendation;
b. A copy of the panel report;
c. A statement that the teacher has a right to a hearing before the board, if he requests it within 10 days of receipt of this notice; and
d. A tentative date, time, and place for a hearing, if requested.

Comment: The notice provisions of the section are required by G.S. 115–142(i)(6). It prohibits the board of education from taking any immediate action on the superintendent's recommendation and requires the board to give the teacher a copy of the superintendent's recommendation and the review panel's report within 10 days after the superintendent submits his recommendation. The teacher has 10 days to notify the board if he wants a hearing.

Form 2 in Appendix A is a proposed notice form.

SECTION 11. BOARD HEARING WAIVED

If the teacher does not respond within 10 days after receiving the notice provided for in Section 10, it shall be presumed that he has waived his right to a hearing before the board of education. The board shall then consider the recommendation and may by resolution dismiss or reinstate the teacher.

Comment: G.S. 115–142(i)(6) requires the teacher to request a hearing before the board within 10 days after he receives the board's notice. If no request is made, the board may act on the superintendent's recommendation without a hearing.

SECTION 12. BOARD HEARING REQUESTED

If the teacher requests a hearing, the board shall schedule it at the earliest possible date, but not sooner than 10 days after the teacher receives notice of the date. However, if both the teacher and the superintendent desire an earlier hearing date and can agree to it in writing, the board may set an earlier hearing time. The teacher or superintendent may request a delay, which should be granted when good and sufficient cause is shown.

Comment: When the teacher notifies the board that he wants a hearing, G.S. 115–142(i)(6) requires it to set the time and place for the hearing and to give him at least 10 days' notice of the time and place. If both the teacher and the superintendent should not want to wait for 10 days to begin the hearing and can agree to an earlier hearing date, the statute probably will not be violated if the hearing is held earlier. To protect itself, however, the board should require the teacher and superintendent to sign a statement that they prefer an earlier hearing time.

SECTION 13. COMPOSITION OF THE HEARING BOARD

(a) The Hearing Board

The [name of the local school unit] Board of Education shall act as the hearing board. A quorum consists of a majority of the members.

Comment: The superintendent is the ex officio secretary of the board and is not considered to be a board member.

A question may arise whether a panel of two board members may be used to conduct the hearing. G.S. 115–34 permits such panels in appeals from "the decision of all school personnel." Although "decision" is a broad term, it is my opinion that the word as used here means affirmative action that has changed the teacher's status. Since no such action has been taken at this point in the dismissal procedure, I do not think the board should attempt to use a panel in place of the entire board. Moreover, the tenure act speaks only in terms of the board and makes no mention of panels.

(b) The Presiding Officer

The chairman of the board of education, or another board member designated by the chairman, shall be the presiding officer.

The presiding officer shall have the following duties and powers:

(1) He schedules the hearing at a specified date, time, and place. He has authority to postpone the date and time or change the place for good cause.

(2) He assures the presence of a quorum at the meeting.

(3) He is available before the hearing to answer any questions that the teacher or his representative may have about the nature and conduct of the hearing.

(4) He has full charge of the hearing and has authority to direct its proceedings and to control the conduct of all persons present, subject to the general directions of this procedural code. He may limit questioning that is unproductively long or irrelevant.

(5) He writes the board's findings of fact and decision. He may delegate this responsibility to another board member.

Comment: The board needs an executive to make arrangements of time and place and assure the proper notification of all participants. Some one person must be in charge of the hearing, have the authority to say "who can do what," and maintain order at the hearing. These duties and decisions have been assigned to the chairman of the school board as the logical one to serve as presiding officer. The chairman should avoid relying on the superintendent to handle the hearing arrangements, since the superintendent performs the duties of a "prosecutor" in the dismissal procedure.

SECTION 14. HEARING PROCEDURE

(a) If Teacher Requests Immediate Hearing by Board of Education

The hearing shall begin with the superintendent's (or the school board attorney's, if preferred) presentation of the charges and the evidence to support those charges. The superintendent's witnesses are subject to cross-examination by the teacher. The teacher may then present any evidence to refute or explain the charges and evidence already introduced. The teacher's witnesses likewise are subject to cross-examination. If the board desires additional witnesses it may call them on its own authority. (See Section 17.)

(b) If Review Panel Finds That the Grounds for Superintendent's Recommendation Are True and Substantiated

If the review has found that the superintendent's (or the school board attorney's, if preferred) charges are true and a hearing is to be held, the hearing shall begin with the superintendent, who shall present his recommendation to the board, review the panel report and the evidence considered by the review panel, and present additional evidence, if any, bearing on his recommendation. The teacher may then present any evidence bearing on the charges and testify on the charges or any evidence already introduced. If either the superintendent or teacher presents evidence not presented to the review panel, the other shall be allowed to rebut or explain the newly introduced evidence.

All witnesses are subject to cross-examination.

The report of the panel, which was submitted to the board earlier, shall be deemed competent evidence.

Comment: The tenure act provides for two types of board hearings following the review panel. If the review panel finds

that the evidence substantiates the grounds upon which the superintendent's recommendations are based, the hearing may be informal; according to the statute, G.S. 115–142(k), the board is to consider only the panel report, the superintendent's recommendation, and any evidence presented by the teacher.

Section 14(b) of this code is based on G.S. 115–142(k). However, the code section specifically grants the superintendent the right to introduce evidence not in the panel's report and the right to cross-examine witnesses presented by the teacher. The statute says nothing about the superintendent's introducing additional evidence or cross-examining witnesses, but granting these hearing rights seems consistent with the tenure act. Furthermore, unless the superintendent may cross-examine witnesses, he may be hampered in challenging the validity of the witness's statements and pointing out inconsistencies. If he cannot introduce evidence outside the panel report, he is unfairly deprived of presenting newly discovered evidence or evidence presented to the panel but not included in its report.

(c) If Review Panel Does Not Find That Grounds for Superintendent's Recommendation Are True and Substantiated

If the review panel has found that the superintendent's charges are not true and a hearing is to be held, the hearing shall begin with the superintendent, who shall present his recommendation to the board and introduce any evidence to substantiate it. The teacher may then present any evidence as to whether the grounds are substantiated and testify on the charges or any evidence already introduced. If either the superintendent or teacher presents evidence not presented to the review panel, the other shall be allowed to refute or explain the newly introduced evidence.

All witnesses are subject to cross-examination.

The report of the panel, which was submitted to the board earlier, shall be deemed competent evidence.

Comment: If the review panel does not find the grounds for the superintendent's recommendation to be substantiated, a much more formal hearing procedure is contemplated. [G.S. 115–142(l).] Instead of reviewing the recommendation and panel findings as in (b) above, the superintendent presents his entire case to the board, followed by the presentation of the teacher's evidence. These differences are provided for by this code section. Other differences, such as the subpoena of witnesses, are set out in separate provisions.

SECTION 15. EVIDENCE

Witnesses shall testify in person. However, if a necessary witness is not available, but was available to the panel of the Professional Review Committee, his testimony before the panel, if subject at that time to cross-examination, may be considered by the school board.

The hearing board shall consider only such evidence as it deems to be fair and reliable.

Comment: Courts have uniformly ruled that school board hearings need not be conducted on the basis of the rules of evidence used in a court of law. To do so, courts have said, would impose intolerable burdens on the school board. This section recognizes the difficulty of applying such rules and leaves to the board the determination of what evidence should be considered and the weight it should be given. (See Section 17 for the rule on questioning witnesses.)

SECTION 16. THE TEACHER'S STATEMENT

The teacher may testify in his own defense and may be questioned on his testimony. If he chooses not to testify, his refusal shall not be considered as evidence in determining the validity of the allegations, and he shall not be punished later for refusal to testify.

Comment: G.S. 115–142(j)(3) guarantees the teacher the right to be present and to testify.

The tenure act says nothing about compulsory testimony. Although most cases have held that the Fifth Amendment is not applicable to teacher-dismissal proceedings, the board, as a matter of policy, should not seek to prove the grounds of dismissal by compelling the teacher to incriminate himself.

SECTION 17. QUESTIONING OF WITNESSES

Members of the hearing board, the teacher and his representative, the superintendent, and the school board attorney may question all witnesses who testify before the board, including the superintendent and the teacher. Witnesses shall testify under oath or affirmation administered by a board member. The presiding officer is authorized to limit unproductively long or irrelevant questioning.

Comment: The school board can use any of several oaths in swearing witnesses, including the following one, adopted from G.S. 11–11:

Do you solemnly swear (or affirm) that the evidence you shall give to this hearing before the _____ board of education shall be the truth, the whole truth and nothing but the truth; so help you, God?

SECTION 18. SUBPOENA OF WITNESSES

(a) If the hearing board finds it necessary to have a witness appear and testify at the hearing and the witness refuses after being requested to appear, the board may issue a subpoena to compel his presence.

(b) In a hearing in which the review panel does not find the grounds for the superintendent's recommendation to be true and substantiated, the board shall, at the request of either the superintendent or the teacher, subpoena any witness residing within the state to appear at the hearing and testify. Subpoenas shall be issued "in blank" by the board over the signature of the chairman or secretary. The witnesses shall be entitled to receive the same mileage and per diem as witnesses called in civil cases in the state. The board shall pay for the witnesses subpoenaed except that it shall not be accountable for the witness fees of more than ten witnesses subpoenaed on behalf of the teacher.

Comment: The school board has two statutory authorizations to subpoena witnesses. G.S. 115–32 authorizes the board to issue subpoenas for witnesses "in any and all matters which may lawfully come within the powers of a board and which, in the discretion of the board, requires investigation." This subpoena power can be used at the request of either the superintendent or the teacher.

The second authorization is in G.S. 115–142(1)(3). It is available only when the review panel has not found the superintendent's charges substantiated by the evidence. This statutory provision is set out in section (b) above, almost verbatim. Although the statute says the board shall subpoena witnesses upon the request of the superintendent or teacher, good practice suggests that the witness's appearance be requested before a subpoena is issued to compel his attendance at the hearing, unless it is known in advance that the witness is reluctant to appear.

The term "in blank" refers to the procedure whereby the chairman signs the subpoena without entering the prospective witness's name. The name is entered later by the party requesting the subpoena.

SECTION 19. PUBLIC HEARING

(a) The hearing shall be private unless the teacher or superintendent requests a public hearing.

(b) If the hearing is private, the hearing may be attended by only the members of the board of education, the superintendent, the school attorney, the teacher, the teacher's representative, and a recording secretary. However, if the teacher requests, the presiding officer may allow attendance of impartial observers or members of the teacher's family. Witnesses may be present only when they are giving information to the board.

(c) Only board members and persons whom they request may be present during board deliberations.

(d) Any person who willfully interrupts, disturbs, or disrupts the hearing may be directed to leave by the presiding officer. Failure to leave when requested by the presiding officer is a misdemeanor punishable by imprisonment of not more than six months or fine of $250, or both.

Comment: G.S. 115–142(j)(1) provides that the hearing shall be private unless a public hearing is requested by the teacher or the superintendent.

The presiding officer is authorized by G.S. 143–318.7 to evict anyone who disrupts a public hearing.

SECTION 20. TRANSCRIPT OF HEARING

The hearing board shall record any information presented orally at the hearing. Written matter presented at the hearing shall be the custodial responsibility of the superintendent, who shall provide for its safekeeping.

A transcript of the hearing shall be provided the teacher at board expense, if the teacher requests it.

Comment: G.S. 115–142(n) requires the board to give the teacher a transcript if an appeal is taken to the superior court. G.S. 115–142(e)(5), which deals with procedure when the review panel disagrees with the superintendent's recommendation, provides that a record "shall be made available . . . in the event he [the teacher] wishes to appeal to the superior court." I do not interpret this language to require the board to provide a transcript automatically. The board should not be put to this expense unless the teacher requests a transcript. The teacher may request a transcript to determine whether there is basis for an appeal, in which case it should be provided.

The transcript may be in the form of notes taken by a secretary (not the superintendent) or a tape-recording of the hearing. The most convenient and least expensive way to provide a record is to tape-record the proceedings. If the teacher appeals, then the record can be transcribed and a copy made available to the parties. Untranscribed tapes should be retained for at least 30 days, the period in which the teacher may appeal to the superior court.

SECTION 21. COUNSEL

The teacher may be accompanied by legal counsel or another person at the hearing. This person may act as counsel in the teacher's defense, with the right to present witnesses, question witnesses, make a statement on the nature of the evidence and the proper disposition of the case, and otherwise assist the teacher.

Comment: The teacher has a statutory right to be accompanied by legal counsel or another individual. [G.S. 115–142(j)(3).] The statute and federal constitutional law, however, do not require that an attorney be appointed to represent the teacher. In an evidentiary hearing on pre-termination of welfare payments, the United States Supreme Court found that the recipient must be allowed to retain an attorney, but an attorney need not be provided for him. [*See Goldberg v. Kelly*, 397 U.S. 254 (1970).] This case has been discussed in relation to one's right to counsel in other hearings before administrative agencies and appears to be applicable to the teacher-dismissal proceeding.

SECTION 22. EVIDENCE OVER THREE YEARS OLD

The board shall neither receive nor consider evidence based on conduct or actions that occurred more than three years before the superintendent's written notice to the teacher stating his intention to recommend dismissal. G.S. 115–142(e)(4) provides, however, that this limitation shall not apply to a teacher convicted of "a felony or a crime involving moral turpitude."

Comment: This limitation on evidence is based on G.S. 115–142(e)(4), which prohibits a dismissal based on conduct that occurred more than three years before the superintendent's recommendation, with the exception noted.

SECTION 23. DISPOSITION OF CASE

The school board shall decide by a majority vote whether the grounds for the recommendation are true and substantiated. If it finds that the grounds are true and substantiated, the board shall determine by majority vote whether dismissal is warranted.

The board's decision shall rest solely upon the evidence properly presented at the hearing. The board shall in a written report briefly summarize the evidence, make findings of fact based thereon, and set forth its decision. The presiding officer, or his designee, shall write the report and order of the board and a copy shall be delivered to the teacher.

If the board determines that the grounds are not supported by substantial evidence, the matter is terminated and no further action may be taken against the teacher on the basis of the charges unless new evidence becomes available.

Comment: The requisites of a fair hearing are a finding based only on the evidence presented at the hearing and on the applicable legal rules. [*See Goldberg v. Kelly*, 397 U.S. 254 (1970).] While the rules governing the admissibility of evidence in a court of law are not applicable to the dismissal hearing, the board must determine the weight of the evidence and must consider only reliable evidence.

Form 3 in Appendix A is a proposed form for the findings and order of the board.

CODE III

Nonrenewal of a Probationary or Other Nontenured Teacher's Contract

A. Basis for Nonrenewal

The _____ Board of Education, upon the superintendent's recommendation, may decline to renew the contract of any probationary or other nontenured teacher for any cause it deems sufficient; but the decision may not be arbitrary, capricious, discriminatory, or for personal or political reasons or because the teacher engaged in activity that is protected by the United States Constitution.

Comment: The decision not to rehire a probationary teacher is a discretionary act, but the board's discretion is limited by G.S. 115–142(m)(2). This statute forbids refusal to re-employ to be "arbitrary, capricious, discriminatory or for personal or political reasons." Essentially, it requires the board and the superintendent to act in good faith in deciding not to renew a contract. It also is clear that nonrenewal, as well as dismissal, cannot be premised on conduct protected by the federal Constitution. [*See Johnson v. Branch,* 364 F.2d 177 (4th Cir. 1966) and Civil Rights Act of 1964.] Impermissible grounds for refusal to re-employ the teacher include race, religion, or exercise of a First Amendment right.

B. Procedure for Nonrenewal

SECTION 1. NOTICE OF NONRENEWAL

If the board of education decides that it will not renew the contract of a probationary [nontenured] teacher for the next school

year, the superintendent shall notify the teacher by certified mail, not less than 45 days before the last day of school classes, that his contract will not be renewed. The notice shall state that the teacher may [request a statement explaining why he will not be re-employed and] request a private conference with the teacher's principal and the superintendent on why his contract will not be renewed. (If the teacher is a principal, the conference will be with the superintendent only.)

If the teacher requests [a statement and/or] a private conference, the request shall be in writing, addressed to the superintendent, and made within five days after he receives notice that the contract will not be renewed.

Comment: The tenure statute does not specify what type of notice is to be given a probationary teacher after the board decides that he will not be re-employed. This section requires 45 days' notice by certified mail. Forty-five days would seem to be a minimum time to give the teacher an opportunity to seek new employment and arrange his personal affairs. It also will appear fairer to the teacher for the board to give a minimum of 45 days' notice, since the teacher is required to give 45 days' notice of resignation.

This section also provides for a private conference if the teacher requests it and makes optional the giving of a statement of reasons for not renewing the contract. Neither of these acts is required of North Carolina school boards by either statutory or constitutional law, although they both have been required in some other states. [*See Still v. Lance,* 279 N.C. 254, 182 S.E.2d 403 (1971), holding that notice and a hearing is not required in North Carolina. *But see Drown v. Portsmouth School District,* 435 F.2d 1182 (1st Cir. 1970), *cert. denied,* 402 U.S. 972 (1971).] A school board must decide whether the cost and time of providing a statement and conference is outweighed by the dual advantages that the possibility of arbitrary action will be minimized and the possibility of legal suit reduced.

[OPTIONAL SECTION 2. SUPERINTENDENT'S STATEMENT OF NONRENEWAL]

[If the probationary [nontenured] teacher requests an explanation in accordance with Section 1, the superintendent shall give him a written explanation of the reasons for nonrenewal within five days after receiving the request.]

Comment: The use of this section is optional.

SECTION 3. TEACHER CONFERENCE

If the probationary [nontenured] teacher requests a private conference in accordance with Section 1 of this code, the superintendent shall arrange a time and place suitable with the teacher and his principal. If possible, the conference shall be held within five days after it is requested.

At the conference the superintendent, with the principal's assistance, shall explain why the teacher's contract was not renewed and answer any questions that the teacher has concerning the matter.

Comment: There are several reasons why the school should consider providing the probationary [nontenured] teacher a private conference on why his contract will not be renewed. First, a conference will give the nonrenewed teacher an opportunity to correct misinformation on which the decision was based. Second, it provides an opportunity to eliminate misunderstandings that the teacher, principal, or superintendent may have. Third, it gives the teacher a basis for determining whether the action taken against him is arbitrary, capricious, or a reprisal for exercising a constitutionally protected right. And fourth, it should help the teacher recognize his own weaknesses or shortcomings. (Presumably the teacher will have been counseled under evaluation procedures established by the board.) In most cases the conference will reduce the possibility of legal action by the teacher, and in general this procedure will appear fairer to the rest of the faculty. The advantages clearly outweigh the cost and time of providing it.

The requirements of Section 3 will impose no overwhelming administrative burden on the school board. Such procedures have worked satisfactorily in other states. [*See, e.g.*, Wash. Rev. Code § 28A.67.070 (1964) and Alaska Stat. § 14.20.180(a) (1962).]

[OPTIONAL SECTION 4. SCHOOL BOARD HEARING]

[If the teacher is still dissatisfied with the reasons given as to why his contract was not renewed, he may request a hearing before the board of education. The request must be in writing and made within five days after the private conference provided in Section 2.

The school board may grant the hearing if it thinks it justified. If granted, the hearing shall be held within ten days after the

teacher's request. The teacher shall have at least three days' prior notice of the hearing time.]

Comment: The use of this section is optional. The North Carolina statutes do not require a hearing before the board of education, nor has a court with jurisdiction over this state required it as a matter of constitutional law. Nevertheless, this section is recommended. It does not require the school board to grant a hearing, but the board may do so if it thinks that a useful function will be served by it. By including the provision, the board re-examines the issue at the teacher's request, which suggests a more deliberative process and undercuts a suggestion that the board has acted arbitrarily.

[OPTIONAL SECTION 5. HEARING PROCEDURE]

[If there is a hearing on why the probationary [nontenured] teacher's contract will not be renewed, the hearing shall be private and conducted in an informal manner. The superintendent will explain why the decision was taken and the teacher will be given an opportunity to explain any matter concerning his teaching performance and why his contract should be renewed. The teacher may bring a representative of his choice to the hearing and may question any person appearing at the hearing.]

Comment: If Section 4 is used, this section is necessary. It provides an informal procedure for a school board hearing on the decision not to renew the contract.

CODE IV

Dismissal of Associate or Assistant Superintendents under Contract

A. Basis for Dismissal

An associate or assistant superintendent[3] of the _____ School Administrative Unit may be dismissed during the contract period for one of the following reasons:

a. Misconduct of such a nature as to indicate that he is unfit to continue in his position;
b. Incompetence;
c. Neglect of duty; or
d. Failure or refusal to carry out validly assigned duties.

Comment: G.S. 115–44 sets out the basis for dismissing an assistant superintendent during the contract period. This provision restates the statutory grounds for dismissal.

This code does not apply to the renewal of a contract. The board of education may refuse to renew an assistant superintendent's contract for any reason it deems sufficient, and need give no reason or explanation.

B. Procedure for Dismissal

The 1971 General Assembly amended G.S. 115–44 to provide the basis for dismissing assistant superintendents. The statute provides that "All dismissals during the contract period shall follow the procedure set out for the dismissal of principals and teachers

[3]Hereafter, the term assistant superintendent shall be used to refer to either or both an associate or assistant superintendent.

in G.S. 115–145." Shortly after the amendment to G.S. 115–44 was enacted, the tenure act (codified as G.S. 115–142) was ratified. The tenure act repeals G.S. 115–145 on July 1, 1972, the act's effective date, and sets out a new and elaborate procedure for dismissing teachers and principals. My opinion, concurred in by the Attorney General, is that the statutory procedure of G.S. 115–142 does not apply to the dismissal of assistant superintendents. The reasons for this view are these: (1) Associate and assistant superintendents are specifically excluded from the definition of administrator in G.S. 115–142(a)(1) and, therefore, are excluded from the statutory protections afforded administrators by the act. [*See* G.S. 115–142(d)(2).] (2) G.S. 115–142 puts the full burden of carrying out the new dismissal procedure on the superintendent. When the superintendent is incapacitated, the responsibility rests with the assistant superintendent. It seems clear that superintendents were intended to be separated from teaching personnel in administering the tenure act. (3) The act, taken as a whole, focuses on the classroom teacher and his election to tenured status. Tenure has no application to assistant superintendents, who are employed for a specified period. Thus there is no basis for assuming that the General Assembly intended the tenure provisions and its elaborate dismissal provisions to apply to the chief administrative officers of the school system. If the dismissal provisions of G.S. 115–142 do not apply to assistant superintendents, the only legal requirements on a board of education in dismissing an assistant superintendent during the contract period are compliance with his rights under the contract and constitutional due process. These requirements are met in the dismissal procedure recommended in Code IV.

SECTION 1. INITIATING THE DISMISSAL (SUPERINTENDENT'S INVESTIGATION)

The [name of local school unit] superintendent has the initial responsibility in the dismissal procedure for assistant superintendents. If the superintendent *or* the board of education has knowledge or has received information about an assistant superintendent that would constitute basis for dismissal, and if the superintendent *or* the school board thinks dismissal is an appropriate action if the charges are true, the superintendent shall investigate the charges and review all available information.

The investigation shall include an interview with the assistant superintendent, at which he will be permitted to raise any defense he thinks relevant. Before beginning the interview, the superintendent shall advise the assistant superintendent of the purpose of the interview and the charges against him. If the assistant superintendent requests that other witnesses be questioned, the superintendent shall interview them if possible.

Comment: The superintendent's investigation is intended to be informal and to give him a basis for reaching a preliminary determination about whether the charges are valid and whether dismissal is the appropriate action. Since assistant superintendents work directly with the board of education, this section does not leave dismissal solely to the superintendent's discretion. The superintendent is required to investigate and report to the board if the board has information that would constitute basis for dismissal and directs the superintendent to conduct an investigation.

SECTION 2. SUPERINTENDENT'S RECOMMENDATION

After completing his investigation, the superintendent shall report his findings to the board. His report shall list the charges made against the assistant superintendent and a summary of the evidence that substantiates or refutes those charges. The report may but need not include a recommendation by the superintendent as to whether dismissal is warranted.

SECTION 3. DECISION TO DISMISS

Within fourteen days after receiving the superintendent's report, the board of education shall decide whether to dismiss the assistant superintendent.

Comment: The decision to dismiss the assistant superintendent rests with the board. The superintendent may recommend what action he considers appropriate, but the board is not required to follow that recommendation.

SECTION 4. BOARD OF EDUCATION'S NOTICE OF DISMISSAL

If the board decides to dismiss the assistant superintendent, it shall notify him by certified mail of its intention to dismiss him. This notice shall contain:

a. A list of the charges upon which dismissal is based.
b. A summary of the evidence and the names and positions of the accusers.
c. A statement that the assistant superintendent has a right to a hearing before the board if he requests it within seven days after receipt of the notice.
d. A copy of this code.

Comment: This section requires the board to notify the assistant superintendent by certified mail of its intention to dismiss him and the grounds and evidence upon which the dismissal is based. This notice allows the assistant superintendent to make an informed decision on whether to request a board hearing and to prepare a defense. Constitutional due process standards of adequate notice entitle the assistant superintendent to full knowledge of the offense charged, the basis of the charge, the nature of the hearing, and the opportunities for defense.

SECTION 5. BOARD HEARING WAIVED

If the assistant superintendent does not request a hearing before the board of education within seven days after he receives the notice provided in Section 4, it shall be presumed that he has waived his right to a hearing. The board may then by resolution dismiss or reinstate him.

SECTION 6. BOARD HEARING REQUESTED

If the assistant superintendent requests a hearing, the board shall schedule it at the earliest possible date, but not sooner than seven days after the assistant superintendent receives notice of the date. However, if both the teacher and the board desire an earlier date and can agree to it in writing, the board may set an earlier hearing time. The assistant superintendent may request a delay, which should be granted when good and sufficient cause is shown.

SECTION 7. COMPOSITION OF THE HEARING BOARD

(a) The Hearing Board

The [name of local school unit] Board of Education shall act as the hearing board. A quorum consists of a majority of the members.

(b) The Presiding Officer

The chairman of the board of education, or another board member designated by the chairman, shall be the presiding officer. The presiding officer shall have the following duties and powers:

(1) He schedules the hearing at a specified date, time, and place. He has authority to postpone the date and time or change the place for good cause.
(2) He assures the presence of a quorum at the meeting.
(3) He is available before the hearing to answer any questions that the assistant superintendent or his representative may have about the nature and conduct of the hearing.
(4) He has full charge of the hearing, with authority to direct its proceedings and control the conduct of all persons present, subject to the general directions of this procedural code. He may limit questioning that is unproductively long or irrelevant.
(5) He votes only to break a tie.
(6) He writes the board's findings of fact and decision. He may delegate this responsibility to another board member.

Comment: The board needs an executive to make arrangements of time and place and assure the proper notification of all participants. Some one person must be in charge of the hearing, have the authority to say "who can do what," and maintain order at the hearing. These duties and decisions have been assigned to the school board chairman as the logical one to serve as presiding officer. The chairman should avoid relying on the superintendent to handle the hearing arrangements, since the superintendent performs the duties of a "prosecutor" in the dismissal procedure.

SECTION 8. HEARING PROCEDURE

The hearing shall begin with the superintendent's (or the school board attorney's, if preferred) presentation of the charges and the evidence to support those charges. The superintendent's witnesses are subject to cross-examination by the assistant superintendent. The assistant superintendent may then present any evidence to refute or explain the charges and evidence already introduced. The assistant superintendent's witnesses likewise are subject to cross-examination. If the board desires additional witnesses, it may call them on its own authority. (See Section 11 of this code.)

Comment: Someone must have responsibility for presenting the charges and introducing the evidence to support those charges. This responsibility has been given to the superintendent as the one most logical to perform this function. The superintendent conducted the initial investigation and is the one most familiar with the charges and evidence.

SECTION 9. EVIDENCE

Witnesses shall testify in person whenever available. If a necessary witness is not available, a sworn statement may be substituted.

The hearing board shall consider only such evidence as it deems to be fair and reliable.

Comment: Courts have uniformly ruled that school board hearings need not be conducted on the basis of the rules of evidence used in a court of law. To do so, courts have said, would impose intolerable burdens on the school board. This section recognizes the difficulty of applying such rules and leaves to the board the determination of what evidence should be considered and the weight it should be given. See Section 11 of this code for the rule on questioning witnesses.

SECTION 10. THE ASSISTANT SUPERINTENDENT'S STATEMENT

The assistant superintendent may testify in his own defense and may be questioned on his testimony. If he chooses not to testify, his refusal shall not be considered as evidence in determining the validity of the allegations, and he shall not be punished later for refusing to testify.

Comment: Although most courts have held that the Fifth Amendment provisions do not apply to a school board proceeding, the board, as a matter of policy, should not seek to prove the grounds of dismissal by compelling the teacher to incriminate himself.

SECTION 11. QUESTIONING OF WITNESSES

Members of the hearing board, the assistant superintendent and his representative, the superintendent, and the school board attorney may examine all witnesses who testify before the board, including the superintendent and assistant superintendent. Wit-

nesses shall testify under oath or affirmation administered by a board member. The presiding officer is authorized to limit unproductively long or irrelevant questioning.

Comment: The school board can use any of several oaths in swearing witnesses, including the following one, adapted from G.S. 11–11:

> Do you solemnly swear (or affirm) that the evidence you shall give to this hearing before the _____ Board of Education shall be the truth, the whole truth, and nothing but the truth; so help you, God?

SECTION 12. SUBPOENA OF WITNESSES

If the hearing board finds it necessary to have a witness appear and testify at the hearing and the witness refuses after being requested to appear, the board may issue a subpoena to compel his presence.

Comment: G.S. 115–32 authorizes the school board to issue subpoenas for witnesses "in any and all matters which may lawfully come within the powers of a board and which, in the discretion of the board, requires investigation." This subpoena power can be used at the request of either the superintendent or the assistant superintendent.

SECTION 13. PUBLIC HEARING

(a) The hearing shall be private unless the assistant superintendent requests a public hearing.

(b) If the hearing is private, the hearing may be attended only by the members of the board of education, the superintendent, the school attorney and the assistant superintendent and his representative. However, the presiding officer may allow attendance of impartial observers or members of the assistant superintendent's family if requested. Witnesses may be present only when they are giving information to the board.

(c) Only board members and persons whom they request may be present during board deliberations.

(d) Any person who willfully interupts, disturbs, or disrupts the hearing may be directed to leave by the presiding officer. Failure to leave when requested by the presiding officer is a misdemeanor punishable by imprisonment of not more than six months or a fine of $250, or both.

Comment: G.S. 143–318.7 authorizes the presiding officer to evict anyone who disrupts a public hearing.

SECTION 14. TRANSCRIPT OF HEARING

The hearing board shall record any information orally presented at the hearing. Written matter presented at the hearing shall be the custodial responsibility of the superintendent, who shall provide for its safekeeping.

A transcript of the hearing shall be provided the assistant superintendent at board expense, if he requests it.

Comment: The transcript may be in the form of notes taken by a secretary (not the superintendent) or a tape-recording of the hearing. The most convenient and least expensive way to provide a record is to tape-record the proceedings. If the assistant superintendent appeals, then the record can be transcribed and a copy made available to the parties. Untranscribed tapes should be retained for at least 30 days.

SECTION 15. COUNSEL

The assistant superintendent may be accompanied by legal counsel or another person at the hearing. This person may act as counsel in the assistant superintendent's defense, with the right to present witnesses, question witnesses, make a statement on the nature of the evidence and the proper disposition of the case, and otherwise assist him.

SECTION 16. DISPOSITION OF CASE

The school board shall decide by a majority vote whether the grounds for the recommendation are true and substantiated. If it finds that the grounds are true and substantiated, the board shall determine by majority vote whether dismissal or demotion is warranted.

The board's decision shall rest solely upon the evidence properly presented at the hearing. The board shall in a written report briefly summarize the evidence, make findings of fact based thereon, and set forth its decision. The presiding officer, or his designee, shall write the report and order of the board and a copy shall be delivered to the assistant superintendent.

If the board determines that the grounds are not supported by substantial evidence, the matter is terminated and no further action may be taken against the assistant superintendent on the basis of these charges unless new evidence becomes available.

Comment: The requisites of a fair hearing are a finding based only on the evidence presented at the hearing and on the applicable legal rules. [*See Goldberg v. Kelly*, 397 U.S. 254 (1970).] While the rules governing the admissibility of evidence in a court of law are not applicable to the dismissal hearing, the board must determine the weight of the evidence and must consider only reliable evidence.

Form 3 in Appendix A is a proposed form for the findings and order of the board.

CODE V

Dismissal of Local Superintendent under Contract

A. Basis for Dismissal

The superintendent of the _____ School Administrative Unit may be dismissed during the contract period for one of the following reasons:

a. Immoral conduct;
b. Disreputable conduct;
c. Failure or refusal to perform the duties required of him by law.

Comment: G.S. 115–42 sets out the basis for removing a school superintendent during the contract period. This provision restates the statutory grounds for dismissal.

This code does not apply to the renewal of a contract. The board of education may refuse to renew a superintendent's contract for any reason it deems sufficient, and need give no reason or explanation.

B. Procedure for Dismissal

SECTION 1. INVESTIGATION

The board of education has the full responsibility for dismissing the superintendent. If any board member has knowledge or has received information about the superintendent that would constitute basis for dismissal, the board chairman, or his designee, shall investigate the charges and review all available information.

The investigation shall include an interview with the superintendent, at which he will be permitted to raise any defense he thinks relevant. Before beginning the interview, the superintendent shall be advised of the purpose of the interview and the charges against him. If the superintendent requests that other witnesses be questioned, the investigator shall interview them if possible.

Comment: This section requires what has been the usual practice in North Carolina when a board of education thinks a superintendent is guilty of conduct that will require his dismissal. It imposes no new burden on the board.

The investigation is intended to be informal and to give the board chairman or his designee a basis for reaching a preliminary determination on whether the charges are valid and whether dismissal is the appropriate action. The investigator should be a neutral party and not one who is directly involved in bringing the charges to the board. If the board chairman is so involved, he should appoint a board member who can investigate the charges as a more neutral party.

SECTION 2. INVESTIGATOR'S RECOMMENDATION

After completing his investigation, the investigator shall report his findings to the board. The report shall list the charges made against the superintendent and a summary of the evidence that substantiates or refutes those charges. The report may but need not include a recommendation by the investigator as to whether dismissal is warranted.

SECTION 3. BOARD'S DECISION TO DISMISS

Within fourteen days after receiving the investigator's report, the board of education shall decide whether to dismiss the superintendent.

Comment: The decision to dismiss the superintendent rests with the board. The investigator may recommend what action he considers appropriate, but the board is not required to follow that recommendation.

SECTION 4. PROCEDURE FOR DISMISSAL

The procedure for giving notice and conducting a dismissal hearing set out in Sections 4 through 16 for assistant superin-

tendents shall be the procedure to be followed in dismissing a superintendent. The board chairman or his designee shall perform the duties of the superintendent set out in Section 8 of the procedure for assistant superintendents.

Appendix A

Forms to Be Used in Dismissal or Nonrenewal Proceedings

This appendix includes forms that may be used in notifying the teacher about actions contemplated or taken in the dismissal or nonrenewal of contract procedure by the superintendent or board of education. Use of these forms is not required, of course, but their use will assure compliance with state law.

FORM 1

Superintendent's Notice to Teacher of Recommendation to Dismiss

To: _____

(Teacher's name and position in school system)

1. Please be advised that I, _____, as superintendent of the _____, plan to recommend to the _____ Board of Education that you be dismissed effective _____ for the following reasons:

(Describe here the charges in detail)

2. Three options are available to you.

• *Option One.* You may, within fifteen days after receipt of this notice, request a review by a five-member panel appointed by the State Superintendent of Public Instruction from the Professional Review Committee, a list of whose members is enclosed. You have the right to appear with counsel before this panel and present any evidence on the charges listed above. After the panel review, you may request a hearing before the board of education.

If you request a panel review, you may eliminate from consideration as a member of your panel up to 40 members of the Professional Review Committee. Please strike through any names (up to 40) on the enclosed list of Committee members that you choose to eliminate from consideration for your panel, and return this list with your request for the panel. You may also request that at least two of the five panel members be from your professional peer group. You may so choose by checking the appropriate box at the bottom of the list of members of the Professional Review Committee. Please sign and date the list.

• *Option Two.* If you prefer not to have the panel review the superintendent's recommendation, you may, within fifteen days after receipt of this notice, request a hearing before the board of education. You will have the right to appear with counsel before the board and to present any evidence on the charges listed above.

• *Option Three.* You may do nothing. If you do not request a panel review or school board hearing within fifteen days after receiving this notice, you waive your right to either hearing. The board of education may then act on the superintendent's recommendation, which may result in your dismissal or demotion.

If you do not reply within fifteen days after receiving this notice, this office will assume that you have chosen option three.

3. A copy of the board's procedural code, a copy of the teacher tenure statute (G.S. 115–142), and a current list of the members of the Professional Review Committee are enclosed.

_____ _____

(date) (signature of superintendent)

[Note: This notice must be sent to the teacher by certified mail, return receipt requested.]

FORM 2

Board's Notice to Teacher of Recommendation to Dismiss

To: _____

(Teacher's name and position in school system)

Please be advised that the _____ Board of Education has received a recommendation from the superintendent that you be dismissed (demoted to _____). A copy of the superintendent's recommendation and a copy of the review panel's report are enclosed.

If you desire a hearing before the board on the recommended dismissal (demotion), you must notify the board within ten days of receipt of this notice.

_____ _____

(date) (chairman)

[Note: This notice must be sent to the teacher by certified mail, return receipt requested.]

FORM 3

Findings and Order of the Board of Education

To: _____
(Teacher's name and position in school system)

Please be advised that the _____ Board of Education hereby dismisses (demotes) you on the basis of the following charges, which it finds to be true and substantiated. A summary of the evidence presented before the board of education follows each listed charge.

(List each charge and summarize the evidence that substantiates it.)

(Alternative Paragraph: Please be advised that the _____ _____ Board of Education finds the charges unsubstantiated and dismisses the charges against you.)

This decision rests solely on the evidence presented at the hearing before the school board.

The board hereby orders that you:

____ (a) Be dismissed.

____ (b) Be demoted from the position of _____ to the position of _____.

____ (c) Be demoted by being reduced in compensation in the amount of _____. (Applies only to local supplement money.)

____ (d) Be reinstated and continued in the employment of the school system in the same position held before this action and at the same rate of compensation.

_____ _____
(date) (presiding officer)

cc: Superintendent's Office

[Note: This notice should be delivered to the teacher or sent to him by certified mail, return receipt requested.]

FORM 4

Notice of Nonrenewal of a Nontenured Teacher's Contract

To: _____
(Teacher's name and position in school system)

Please be advised that your contract with the _____ Board of Education terminates at the end of the current school year and the contract will not be renewed.

[*Optional*—If you would like a statement of explanation why you will not be re-employed, the superintendent will furnish such a statement if you request it from him in writing within five days after receipt of this notice.]

If you would like a conference with your principal and the superintendent of schools on why your contract will not be renewed, please notify the superintendent in writing that you request such a conference.

_____ _____
(date) (chairman)

cc: Superintendent and teacher's principal

[Note: This notice should be delivered to the teacher or sent to him by certified mail, return receipt requested.]

Appendix B

State Board of Education Regulations on Hearing Procedures for Local Boards of Education

The tenure statute, G.S. 115–142(j)(2), provides that the hearing before the school board shall be conducted in accordance with such reasonable rules and regulations as the board may adopt consistent with G.S. 115–142, or if no rules have been adopted, in accordance with reasonable rules and regulations adopted by the State Board of Education to govern such hearings. To comply with this provision the State Board of Education adopted the following regulations, which are to be used by a local school board in the event that it does not adopt its own rules for the dismissal proceeding.

Effective July 1, 1972, any hearing conducted by a county or city board of education pursuant to G.S. 115–142(k) and G.S. 115–142(l) shall be governed by the following rules and regulations:

(1) *Hearings private; right of interested parties to request public hearing.*—All hearings shall be private unless otherwise requested by the career teacher or the superintendent. A request for a public hearing must be filed in writing with the Board of Education conducting the hearing within five days of receipt of notice of the date of the hearing. Failure to file a request for public hearing within the time specified shall constitute a waiver of that right.

(2) *Rights of persons directly involved in the hearing.*—At any hearing conducted pursuant to G.S. 115–142(k) or G.S. 115–142(l), the career teacher and the superintendent shall have the right

(1) To be represented by counsel;

(2) To present all relevant evidence by means of witnesses and books, papers, and documents;

(3) To examine all opposing witnesses on any matter relevant to the issue; and

(4) To have subpoenas and subpoenas duces tecum issued in blank to compel the attendance of witnesses and the production of relevant books, papers, and documents.

(3) *Powers of Board of Education in connection with hearing.*—In connection with any hearing held pursuant to G.S. 115–142(k) or G.S. 115–142(l), the Board of Education shall have power.

(1) To have counsel to develop the case;

(2) To subpoena witnesses and relevant books, papers, and documents;

(3) To administer oaths or affirmations to witnesses called to testify;

(4) To take testimony;

(5) To examine witnesses; to punish for contempt for any disorderly conduct or disturbance tending to disrupt the hearing; and

(6) To direct a continuance of any case.

(4) *Rules of evidence.*—At any hearing conducted pursuant to G.S. 115–142(k) or G.S. 115–142(l), boards of education may admit any evidence and may give probative effect to evidence that is of a kind commonly relied on by reasonably prudent men in the conduct of serious affairs. Boards may in their discretion exclude incompetent, irrelevant, immaterial, and unduly repetitious evidence.

(5) *Transcript of the proceedings.*—In all hearings conducted pursant to G.S. 115–142(k) or G.S. 115–142(l), a complete record shall be made of evidence received during the course of the hearing. Where the Board of Education concludes that the career teacher should be dismissed or demoted, the record of the proceedings shall be made available without charge to the career teacher for his use in the event he wishes to appeal to the Superior Court.

(6) *Probationary teacher.*—All rules and regulations herein applicable to the career teacher shall apply to the probationary teacher discharged or dismissed during the school year.

(7) *Applicability of rules and regulations.*—These rules and regulations shall not apply to any county or city board of education which has adopted its own rules and regulations as to procedures to be followed at a hearing conducted pursuant to G.S. 115–142(k) or G.S. 115–142(l).

Appendix C

Time Requirements Set by the Statute for Dismissing a Teacher

A. When Review Panel Is Used

15 days—Teacher has to request a panel to review superintendent's recommendation
5 days—Local superintendent has to notify State Superintendent that a panel must be appointed
10 days—State Superintendent has to designate a panel
30 days—Panel investigation period
[60 days—Extension for panel investigation if panel deems it necessary]
30 days—Superintendent has to submit dismissal recommendation to board after receiving panel report
10 days—Board has to notify teacher of dismissal recommendation
10 days—Teacher has to request board hearing
10 days—Minimum notice board must give teacher of time and place of hearing

Total 120 days to local board hearing if full times used (plus up to 60 more days if panel chooses to extend its investigation)

3–7 days—Board to conduct hearing and write decision (est.)
30 days—Teacher has to file appeal to superior court

B. When There Is No Hearing Before the Review Panel or the Board of Education

20 days—Local superintendent *must wait* after giving notice to teacher before submitting dismissal recommendation to board

C. When Review Panel Is Not Used But There Is a Hearing Before the Board of Education

20 days—Local superintendent must wait after giving notice to teacher before submitting dismissal recommendation to board
10 days—Minimum notice board must give teacher of time and place of hearing

Total 30 days to local board hearing

3–7 days—Board to conduct hearing and write decision (est.)
30 days—Teacher has to file appeal to superior court.

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